UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,
vs.
JOHN B. RAUH.

OCTOBER TERM, 1891.

No. 13.

BRIEF FOR PLAINTIFF IN ERROR.

W. C. BELCHER,
Attorney for Plaintiff in Error.

IN THE

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THE SOUTHERN PACIFIC COMPANY, *Plaintiff in Error,* *vs.* JOHN B. RAUH.	October Term, 1891. No. 13.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This was an action at law brought by the plaintiff (defendant in error here) against the defendant (plaintiff in error here), to recover damages for injuries alleged to have been sustained through the negligence of the defendant, a railroad corporation and common carrier. Rauh, the plaintiff, was a passenger on a train of defendant, and claims to have been injured by an accident caused by the giving way of a bridge under the train. The cause was tried before a jury, and the plaintiff had a verdict and judgment for $10,000 and costs.

The only question on the trial, so far as pertinent here, was whether the plaintiff received any injury by reason of the accident, and, if so, what was the nature and extent of such injury. The evidence on both sides as to this issue consisted mainly of the testimony of medical gentlemen, of whom the plaintiff called four, including his attending physician, and the defendant three. The facts developed were briefly these :

The plaintiff was sitting in a car at the time of the accident, and was lifted by the shock forcibly from his seat to a standing position, and was immediately thrown back with violence into

the seat. By these movements he received a slight bruise on his head, and complained of considerable pain in different parts of his body. About half an hour afterward he left the car, with the assistance of friends, and walked to a fire which had been built near by, where he remained during the night. The next day he took the train to Portland, and from thence to Tacoma, where he resided. On this trip he walked several times for some distance, with the assistance of friends, but frequently complained of pain. On arriving at home he went to bed, and on consulting a physician was informed that he had "railroad spine," and must remain in bed and perfectly quiet for a considerable time. Accordingly he continued in bed up to the time of the trial, a period of about six months. During this time he was constantly attended by a physician, and was on several occasions minutely examined by other physicians. A number of these physicians testified on the trial, and their testimony as to his symptoms was, on all important points, substantially identical. They all agreed that no sign of injury to his person could be discovered, and that the symptoms of illness noted (the chief of which were: unnatural frequency of respiration and pulse, slight dilation of the pupil of the eye, hesitation in speech, rare fever and chills, and constipation), were such as might be due, some to hysteria, and some to prolonged confinement in bed. The only disagreement between the medical witnesses as to the symptoms was, that the witnesses for plaintiff claimed to have discovered a slight difference between the right and left legs as to the sensibility of the skin and muscles; while those for defendant testified that, upon careful examination, they were unable to detect any such difference. Plaintiff's witnesses, however, did not claim that this alleged symptom indicated the existence of any injury; and there was no proof that this alleged difference in sensibility was greater than might be found in an individual in normal health, nor that it had not existed in plaintiff prior to the accident.

The medical witnesses for plaintiff, after detailing the results of their observation and examination, each testified that he could not tell what was the matter with plaintiff, and not one of them testified that in his opinion the condition of plaintiff was due to the injuries alleged to have been received by him. On the other hand, each of the medical witnesses for defendant testified that plaintiff exhibited no signs of having received any injury, and that the symptoms observed were due to "traumatic hysteria," that is, hysteria resulting from the shock or fright of the accident, aggravated by the improper and unskillful medical treatment which, as they claimed, had been adopted, and by the excitement of litigation; and that the plaintiff voluntarily, though perhaps unconsciously, had, to some extent, feigned these symptoms with the view of enhancing his damages. Two

of these latter witnesses had had very considerable experience in such cases, while none of plaintiff's witnesses claimed to have had any such experience. In short, the testimony for plaintiff disclosed no injury to plaintiff beyond the inconsiderable bruise received at the time of the accident, the pain, if any, experienced for a short time thereafter, and the inconvenience resulting from the interruption of his journey; and no connection whatever was shown between the accident and his subsequent illness ; while, on the other hand, the testimony for defendant was direct and positive that that illness was not due to the accident, but to plaintiff's own imagination and feelings, and to improper medical treatment.

In this state of the evidence the Court gave the following charge to the jury :

"A person who has been hurt in a railroad accident has no right to exaggerate or aggravate his real injury for the purpose or with the expectation of making the railroad company pay for it; and if you believe from the evidence in this case that the plaintiff was only slightly bruised and injured at the time of the wreck, and that such injury was such that it did not necessitate his confinement in bed for more than a few days or weeks, but under the mistaken advice from his physician, or of fright on his own part, he has been induced to remain in bed and refrain from taking proper exercise and making proper effort toward recovery, until he has become hysterical, and is suffering from an imaginary condition of injury having no substantial existence ; then if you find that his injuries were caused by negligence on the part of the company, and not by the wrongful removal of a rail from its track, you should allow the plaintiff only such damages as will compensate him for his real injury, and the expense necessarily incurred by him on account thereof, together with such loss of time and earnings in his business, if any, as in your belief has necessarily resulted from his real injury, and not such as have unnecessarily resulted from imaginary injuries having no real existence.

"The medical witnesses who have testified on behalf of the plaintiff, while expressing the opinion that he is a very sick man, all admit that they are unable to discover any positive sign of injury to his person, or any symptom in his case other than such as frequently attends hysteria, and say that they are unable to determine what is the matter with him; while the medical witnesses on the part of the company all say that plaintiff's case is one of clearly defined traumatic hysteria, or a hysterical condition following an injury, which condition, under proper advice and treatment, should not have existed; that his real injury at the time of the wreck was only slight; and that his present apparent condition is unnecessary and unreal. No medical witness on the part of the plaintiff claims to have had any previous experience in treating any apparently similar injuries from a railroad

accident, while two of the defendant's medical witnesses testified to having had very considerable experience in such cases. If, therefore, you believe that these medical witnesses are all equally honest, and equally capable in their professional qualifications, the testimony of those of them who have had experience in such cases is entitled to greater weight than is the testimony of those who have not had any such experience, and in arriving at your verdict you should be governed always by the better evidence. It is admitted by the medical witnesses in this case that according to the highest medical authorities on the subject the hope of obtaining compensation for injury received in railroad accidents is a very important factor, to be carefully considered in the cases of persons claiming to have received such injuries. You should therefore carefully consider that point in arriving at your verdict in this case; and if you believe that plaintiff's apparent condition is in part voluntary or feigned, or is induced by hope of compensation, and with a view to increasing the damages which he is asking to recover, you should allow him only such amount of damages as in your opinion he has honestly and really sustained."

We claim, and shall contend on this argument, that, as the evidence was all one way on this issue, and as it cannot be supposed that the jury intended to award so large a sum as $10,000 for the injuries actually proved, it follows that the jury disobeyed and disregarded this charge of the Court, and that there is no evidence whatever to support so much of the verdict as awards a sum in excess of compensation for those injuries.

On the trial the Court, against defendant's objection, permitted plaintiff to prove that he had a wife and two children, the latter aged respectively seven and five years. This ruling we assign as error.

On the examination of jurors on *voir dire* certain of the jurors testified that, from information they had received, they had formed an opinion as to the merits of the case. Thereupon the defendant asked certain of said jurors whether that opinion was such as would require evidence to remove it, and asked certain of them whether they thought that, notwithstanding such opinion, they could try the case according to the evidence and the charge of the Court; but the Court refused to permit such questions to be asked. The Court also refused to permit defendant to ask a juror, on such examination, whether he had any such bias or prejudice against corporations or railroad companies, as such, as would interfere with his verdict in a case in which such corporation was a party. The Court also overruled defendant's challenges for cause to jurors who testified that, from information they had received, they had formed fixed opinions as to the merits of the action, and one of whom testified that it would certainly take evidence to remove this opinion. Each of these rulings we assign as error.

SPECIFICATION OF ERRORS.

The following are the errors asserted and intended to be urged by plaintiff in error as ground for a reversal of the judgment in this cause :

1. The Court erred in refusing to allow Robert Griffin, upon his examination on *voir dire* as to his competency to sit as a juror in the trial of this cause, to answer the following question propounded to him by defendant's counsel :

Question : " Have you any such bias or prejudice against corporations, as such, or railroad companies, as would interfere with your conclusions in finding a verdict in a cause in which said corporation or company was a party ?"

And the Court erred in overruling the defendant's challenge for cause, which was thereupon taken as to said Griffin being a competent person to sit upon said jury.

2. The Court erred in refusing to allow Mr. Craybill, who was being examined on *voir dire* as to his competency to sit as a juror on the trial of this cause, to answer the following question propounded to him by defendant's counsel after he, Craybill, had stated that he had to a certain extent an opinion formed as to the cause of the wreck and the liability of the company for it:

Question : " Is that such an opinion as would require evidence to remove it ?"

The Court further erred in overruling defendant's challenge of said Craybill for cause, after he had further testified on his *voir dire* as follows :

Question. " Is that a fixed opinion ?"

Answer. " Well, it is an opinion that would certainly take evidence to remove it."

Question. " Then you think it is a fixed opinion at the present ?"

Answer. " Yes, I think so."

Whereby defendant was forced to either accept of said Craybill as a juror or to challenge him peremptorily, which latter defendant did, and was thereby forced to exhaust one of his three peremptory challenges allowed it by law.

3. The Court erred in overruling defendant's challenge for cause of C. P. Bacon as a competent juror to sit upon the jury in the trial of this cause, he, the said Bacon, having testified as follows, upon examination on his *voir dire* as to his qualifications to sit as a juror, namely :

Question. " Have you heard or read anything in regard to the supposed cause of the wreck ? or anything in regard to whether the railroad company, in your judgment, should be held liable or not for the wreck ?"

Answer. " I have."

Question. " Where did you obtain that information ?"

Answer. "From reading the newspapers."

Question. "From what you read did you form or express any opinion as to the liability of the company, or otherwise?"

Answer. "I have, both."

Question. "Is that a fixed opinion?"

Answer. "It is."

Wherefore, defendant's counsel challenged said juror for cause, which challenge was overruled by the Court.

4. The Court erred in refusing to allow V. Cimino to answer the following questions propounded to him by defendant's counsel in his examination on *voir dire* as to his qualifications to sit as a juror on the trial of this cause, namely:

Question. "Do you think you would be governed by the evidence that would be given in this case, and the law as given you by the Court, without regard to anything you may have read or heard about it?"

5. The Court erred in refusing to allow H. B. Foster, when examined on his *voir dire* as to his competency to sit as a juror on the trial of this cause (after he had stated that he had formed an opinion which he then still entertained as to the cause of the wreck and the liability of defendant therefor), to answer the following question propounded to him by defendant's counsel, namely:

Question. "I will ask you to state whether it would take evidence to remove the opinion which you have formed;" whereby defendant was forced either to challenge said Foster peremptorily, or to accept him as a juror in the cause, which latter the defendant did.

6. The Court erred in refusing to allow D. C. Richardson to answer the following question propounded to him by defendant's counsel on examination on *voir dire* as to his qualifications to sit as a juror on the trial of this cause, after he had testified that he had formed and still entertained, to some extent, an opinion as to the cause of the wreck and the liability of defendant therefor, namely:

Question. "Do you think, notwithstanding the opinion you have formed, that you could try this case according to the evidence as it shall be given you here and the charge of the Court, without regard to anything else?"

* * * * *

8. The Court erred in sustaining the challenge for cause interposed by plaintiff's counsel to Herbert Hollman as a competent and qualified juror to sit on the trial of this cause after he had been accepted by defendant, but had answered on further examination on his *voir dire*, as follows, questions propounded to him by plaintiff's counsel:

Question. "What interest have you in the boat on which you run?"

Answer. "I am a stockholder in the company."

Question. "Has your company any business connection with the Southern Pacific Company?"

Answer. "We have."

Question. "Is it extensive?"

Answer. "I do not know what you call extensive. It amounts to considerable to us; it is quite an accommodation."

Question. "Is it a general traffic arrangement?"

Answer. "It is in this season."

9. Error of the Court in permitting plaintiff, against the objection of defendant's counsel, to answer the following question propounded to him by his own counsel:

Question. "You may state what family you have?"

Which was objected to by defendant's counsel as being immaterial.

Whereupon the Court ruled as follows: "I think this may be admitted for this reason: Of course it cannot be admitted to affect the question of damages sought to be recovered, but we will take some notice of human nature and its tendencies, the affections of men and women, and I think it may be assumed that a father and husband ordinarily, if his family needs his services to support their lives, would naturally give it to them if he could. It does not always follow that he will, because we know there are a great many men who do not, but we may assume that to be the rule. If this man remained in bed a certain length of time or all the time since this accident occurred, I think the fact that he has a family dependent upon him and no resources might go to the jury for what it is worth, to say whether he is shamming or not."

Whereupon plaintiff answered as follows:

Answer. "I have a wife and two children."

Question. "How old is the oldest?"

Answer. "Seven years the one and five years the other."

10. The jury, in finding their verdict against defendant in favor of plaintiff for ten thousand dollars damages, disregarded the following portion of the charge given to them by the Court: "The medical witnesses who have testified on behalf of the plaintiff, while expressing the opinion that he is a very sick man, all admit that they were unable to discover any positive present sign of injury to his person, or any symptom in his case other than what frequently attends hysteria, and say that they are unable to determine what is the matter with him, while the medical witnesses on the part of the company all say that the plaintiff's case is one of clearly defined traumatic hysteria, or a hysterical condition following an injury, which condition, under proper advice and treatment, should not have existed; that his real injury at the time of the wreck was only slight, and that his

present apparent condition is unnecessary and unreal. No medical witness on part of the plaintiff claims to have had any previous experience in treating any apparently similar injury from a railroad accident, while two of defendant's medical witnesses testified to having had very considerable experience in such cases. If, therefore, you believe that these medical witnesses are all equally honest and equally capable in their professional qualifications, the testimony of those of them who have had experience in such cases is entitled to greater weight than is the testimony of those who have not had any such experience; and in arriving at your verdict you should be governed always by the better evidence."

11. The damages allowed by the jury are excessive, and so contrary to the testimony of the medical witnesses as to show that the jury were governed by passion or prejudice in fixing said damages.

ARGUMENT.

I.

The Verdict is Against Law and the Evidence

As shown by the preceding statement of facts, the only injuries proved to have been received by plaintiff were slight and unimportant. The testimony as to these injuries will be found at pages 26–31, 33, 34, 39–47, 49–53, 55–59. Neither of the witnesses who observed plaintiff at and after the time of the accident testified to any symptoms of injury except complaints made by plaintiff, and the plaintiff himself testified to nothing except that he felt pain. It must be assumed, as matter of common knowledge, that any serious injury to the body will produce some symptom which can be observed by a physician, if not by a layman. But none of the physicians called by plaintiff testified to the existence of any such symptoms. They stated that they had observed certain symptoms; but none of those symptoms could, by an unprofessional person, be traced to any injury; and none of these witnesses were able to trace any of those symptoms to any injury, nor, indeed, to state their cause at all. Dr. Van Buren, the attending physician, testified (pp. 69, 71) that he could not tell what was the matter with plaintiff, and (p. 73) that all the symptoms discerned by him might be produced by hysteria. Dr. Panton testified (pp. 76, 80) that he could not tell what was the matter with plaintiff, (pp. 79, 80) that he did not know of any symptoms which might not be caused by hysteria and confinement in bed, and (p. 81) that

the hope of compensation frequently plays an important part in the symptoms in such cases. Dr. Giesy (pp. 87, 89, 90) testified to the same effect. Dr. Saylor (pp. 93, 94) testified that, merely from his own examination of plaintiff, he could not say what was the matter with plaintiff, and that, having had no experience in cases of traumatic hysteria, he could not say whether or not the symptoms might have resulted from that cause. Each of these witnesses stated that he had had no previous experience in similar cases (pp. 72, 78, 89). Taking, then, this testimony alone, it does not tend to show that plaintiff's illness was due, in any degree, to any injury received in this accident. Since these witnesses, all medical men, one of them the attending physician, and the others speaking from personal examination, could not even form an opinion whether or not the symptoms were caused by any such injury, or whether or not any injury had been received, it is obvious that the jury could have no right to infer the existence of any injury from their testimony.

On the other hand the testimony of defendant's medical witnesses, all of them gentlemen of skill and experience, showed conclusively that the case was one of mere hysteria, aggravated by persistence, by long confinement in bed, and by unskillful treatment. Dr. Wilson testified (pp. 98, 103) that he could discover no sign of injury, that plaintiff was suffering from hysteria, that the proper treatment would have been a moral one, and that (p. 106) if he had been properly treated he would have been well. Dr. McKenzie, who had (pp. 119, 120) had much experience in such cases, testified (pp. 112, 113, 118) that there were no signs of injury, that plaintiff's condition was merely hysterical, that his symptoms were largely under his own control, and that under proper treatment he would have recovered speedily. Dr. Bevan, whose experience in such cases (p. 100) had been very extensive, testified (pp. 126–130) that plaintiff's symptoms indicated that he had been badly frightened by the accident and had become hysterical ; that, under the mistaken advice and treatment of his physician, he had remained in bed until his nervous weakness had become much aggravated, and that he could have been cured in a few days or weeks by simply convincing him that there was nothing the matter with him. His conclusion (p. 145) was that plaintiff was suffering merely from his confinement, and that on the termination of this litigation he would probably recover speedily.

The testimony of these witnesses is much too long and minute for condensation ; but it shows, beyond question, that the alleged illness of plaintiff, on account of which the principal portion of the damages must have been awarded, is not traceable to any injury received in this accident, and that no serious injury was, in fact, received on that occasion. On this issue

the burden of proof was on the plaintiff. He was bound to show what injuries, if any, he had received, and was not entitled to recover for any suffering, sickness or disability, without producing evidence tending, at least, to connect it with the accident. This he wholly failed to do. There was no evidence tending, in the smallest degree, to show any injury beyond a slight bruise, the inconvenience produced by the interruption of the journey, and the pain experienced at the time; and the testimony for plaintiff leaves it at least doubtful whether the greater part of this pain was not imaginary. Certainly there was no proof of any physical cause for any such pain. Under these circumstances it is manifest that the jury must have disregarded the Court's instructions (pp. 153–154), and must have awarded damages for injuries not only not proven, but which even plaintiff's medical witnesses would not, even as a matter of mere opinion, affirm to exist. The verdict was therefore unsupported by evidence and against law.

II.

The Court Erred in Admitting Evidence as to Plaintiff's Family.

On the examination of plaintiff as a witness (p. 33), the Court, against defendant's objection, permitted plaintiff to testify that he had a wife and two young children. It is obvious that such testimony is, in general, irrelevant to any such issues as those presented by the pleadings in this case. The only issues were: Was plaintiff injured? Did that injury result from the negligence of defendant? How much was plaintiff damaged? It is plain that this testimony would not tend to prove anything on either of these issues; while it is equally plain that it would have a tendency to induce the jury to award a greater amount of damages than they otherwise would. This testimony, then, was not only improper but clearly injurious.

The learned Judge, in admitting this testimony, used the following language:

"*Court*—I think this may be admitted for this reason: Of course, it cannot be admitted to affect the question of damages sought to be recovered. But we will take some notice of human nature and its tendencies, the affection of men and women; and I think it may be assumed that a father and husband ordinarily, if his family needs his services to support their lives, would naturally give it to them if he could. It does not always follow that he will, because we know that there are a great many men who do not; but we may assume that to be the rule. If this man remained in bed a certain length of time or all the time since this accident occurred, I think the fact that he has a family

dependent upon him, and no resources, might go to the jury for what it is worth to say whether he is shamming or not."

We submit that the reason so assigned is insufficient. In the first place, at that stage of the case, when no question had been or could have been raised as to whether plaintiff was "shamming or not," this reason could have no bearing peculiar to this case, and it would follow that such testimony if admissible here, might be introduced in any case. But, passing this by, it is clear that this evidence could have no natural tendency to prove anything on the subject as to which it was admitted.

The reasoning of the learned Judge amounts to this: "A man with a family to support is less likely to feign illness than one without a family; plaintiff has a family to support; therefore it is not likely that he is feigning illness." This syllogism, even if the major premise were true, would be incorrect; for plaintiff might be less likely than other men to do a particular act, and yet might be very likely, and, indeed, sure to do it. But that premise is not true. It might perhaps be admitted that a husband and father would not feign illness when he thought that such a course would be hurtful to his family; though, as the learned Judge admits, "a great many men" are not governed by such considerations. But the theory of defendant in this case was not that plaintiff was exactly "shamming," but that the hope of thereby recovering larger damages from defendant caused him, whether voluntarily or involuntarily, to make his symptoms appear graver than they really were. This theory was supported by testimony. If this theory be true, and it is at least as reasonable as the other, it is evident that this very regard for the welfare of his family, on which the Court insisted, would have a tendency precisely the contrary of that assumed. If plaintiff thought that feigning illness would be productive of benefit to his family he would, on the very theory assumed, be likely to adopt that course. In order, therefore, to make the syllogism correct, the major premise should be: A man with a family to support is less likely to feign illness than one without a family, if he supposes that such a course would be injurious to his family. But in that case the minor premise would fail to support the syllogism, because it could not be ascertained, without another presumption, as to what plaintiff supposed in the given case, and a presumption cannot be founded on another presumption.

It is, therefore, clear that the assumption on which this testimony was admitted is unsound; and, as the ruling cannot be supported on any other ground, it was erroneous. There can be no question that the real reason, on the part of plaintiff, for offering this testimony was to induce the jury to award greater damages, and that this effect was probably secured.

III.

The Court Erred in its Rulings on the Impaneling of the Jury.

1. The juror Craybill (p. 19), and the juror Foster (p. 21), testified on *voir dire* that they had heard about the circumstances of the accident, and had formed and still retained an opinion as to the liability of defendant. Thereupon defendant asked each of said jurors whether that opinion was such as would require evidence to remove, but the Court refused to require this question to be answered.

We submit that the inquiry so proposed was a proper one, and should have been allowed. It is not important to inquire whether the test there suggested would or would not be conclusive. In either view it certainly is an important consideration, and has a strong tendency towards determining whether or not the juror has such a bias as would prevent him from trying the case impartially. Surely, if the evidence in a case is equally balanced, the jury are bound to find against the one on whom rests the burden of proof. Yet, if a juror sets out with an opinion which can be removed only by evidence, and which, therefore, will remain when the evidence is equally balanced, he certainly has a bias toward one side. In order, therefore, to arrive at the state of a juror's mind such a question is proper, and the refusal to permit it must necessarily be injurious.

2. The juror Craybill testified (pp, 19, 20,) on his *voir dire*, that he had read, heard and talked about the accident in question, that he had conversed on the subject with one of the railroad commissioners of the State of Oregon who had made an investigation into the cause of the accident, that he had carefully read the entire report of the railroad commission on the subject, and placed credence in it, that he had also read the newspaper reports, and that he had formed and still retained an opinion as to the liability of defendant, which he considered "a fixed opinion," and one "that would certainly take evidence to remove it." On this evidence, the defendant interposed a challenge for principal cause, which was disallowed by the Court.

We submit that the testimony of this juror shows an extreme case of disqualification. Not only was his opinion of a fixed and positive nature, requiring evidence to remove it, but it was founded, not on mere rumor, but on the statements and reports of public officers of the State who had investigated the subject in their official capacity. Actual conversations with eye-witnesses would probably not have caused so deep an impression as was undoubtedly caused by this official report. If a juror can in any case be disqualified by his preconceived opinion, then this juror was disqualified.

It should here be remarked, as applicable to this and all other exceptions taken on the impaneling of the jury, that defendant exhausted the three peremptory challenges allowed it by law, and was thereby compelled to accept as jurors some of those to whom challenges for cause had been disallowed.

3. Defendant propounded to the juror Griffin, upon his examination on *voir dire*, (p. 18) the following question :

" Have you any such bias or prejudice against corporations as such, or railroad corporations, as would interfere with your conclusion in finding a verdict in a cause in which such corporation or company was a party ?"

It would seem evident that here, again, is an inquiry which should have been allowed, whether the test suggested is conclusive or not. An affirmative answer to such a question would at least tend to show improper bias on the part of the juror.

4. The juror Bacon (p. 20) stated that, from information obtained from the newspapers, he had both formed and expressed an opinion as to the liability of defendant, and that this opinion was a fixed one. These statements were not qualified in any manner. The Court disallowed a challenge for principal cause interposed by defendant. What we said above with regard to the juror Craybill will apply here.

5. The juror Richardson (pp. 21, 22) after having stated on *voir dire* that he had formed and retained an opinion, was asked by defendant this question :

" Do you think, notwithstanding the opinion which you may have formed, that you could try this case according to the evidence as it shall be given you here, and the charge of the Court, without regard to anything else ?"

Similar questions were propounded to the juror Cimino (p. 21) and to the juror Crapper (pp. 22, 23); but the Court refused to require either of these questions to be answered.

Many courts at the present day regard an affirmative answer to such a question as nearly conclusive in favor of the juror, at least where the opinion is derived from mere rumor or newspaper reports. A negative answer, then, ought certainly to disqualify. When the juror himself doubts his ability to divest himself of his preconceived opinion, he certainly ought to be rejected. The question, therefore, was a proper one, and should have been allowed.

For the reasons hereinbefore assigned, we respectfully submit that the judgment in this cause should be reversed.

W. C. BELCHER,

Attorney for Plaintiff in Error.

No. 107

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

OCTOBER TERM, 1891.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,
vs.
JOHN B. RAUH,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Oregon.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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PORTLAND, OREGON:
S. C. BEACH, PRINTER, UNION BLOCK, COR. FIRST AND STARK STREETS.
1892.

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the court to the jury, and the claim that the damages awarded the defendant in error are excessive.

We have not before us the brief of the plaintiff in error and will consequently assume that it sets forth with particularity a statement of the case, which need not be elaborate, and will therefore proceed immediately to the consideration of the errors assigned.

Two errors are alleged to have been committed in the examination upon *voir dire* of Robert Griffin, who was called as a juror. The first of these is to the refusal of the court to allow the following question, which was propounded to him by counsel for the plaintiff in error, to be answered, viz:

"Have you any such bias or prejudice against corporations as such, or railroad companies, as would interfere with your conclusions in finding a verdict in a cause in which such corporation or company was a party?"

The bill of exceptions recites that, "Whereupon the court stated that the juror need not answer the question, and the juror did not answer the same, to which ruling and action of the court counsel for the defendant then and there excepted, and the exception was allowed.

"Thereupon the counsel for the defendant submitted a challenge for cause to the said juror, and the court overruled the challenge;

to which ruling of the court the defendant then and there excepted, and the exception was allowed.

"Thereupon the said person was taken as a juror." [Record, pp. 18, 19]

There are several statutory provisions of the State of Oregon which have an important bearing upon the questions under consideration and we beg here to call the court's attention to them. They are to be found in volume one of Hill's Annotated Laws of Oregon, in the following sections:

"Sec. 183.—A challenge for cause is an objection to a juror, and may be either

1. General; that the juror is disqualified from serving in any action; or,

2. Particular; that he is disqualified from serving in the action on trial."

"Sec. 184.—General causes of challenge are:—

1. A conviction for felony;

2. A want of any of the qualifications prescribed by law for a juror;

3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body, as renders him incapable of performing the duties of a juror."

"Sec. 185.—Particular causes of challenge are of two kinds:—

1. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

2. For the existence of a state of mind on the part of the juror, in reference to the action, or to either party, which satisfies the trier, in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias."

"Sec. 186.—A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:—

1. Consanguinity or affinity within the fourth degree to either party;

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, the adverse party; or being surety or bail in the action called for trial, or otherwise, for the adverse party;

3. Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.

4. Interest on the part of the juror in the event of the action, or the principal question involved therein."

" Sec. 187.—A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section 185. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially."

" Sec 192.—The challenge may be excepted to by the adverse party for insufficiency, and if so the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so the court shall try the issue and determine the law and the fact."

"Sec. 193.—Upon the trial of a challenge, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or found to be true, as the case may be, it shall be allowed, and the juror to whom it

was taken excluded. But if determined or found otherwise, it shall be disallowed."

"Sec. 230.—An exception is an objection taken at the trial to a decision upon matter of law, whether such trial be by jury or court, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception be material and affect the substantial rights of the parties."

"Sec. 231.—The point of exception shall be particularly stated * * * *"

I.

A discussion of the questions raised by the action of the court in regard to the juror Griffin will largely cover the whole field before us.

There are two propositions involved; the first, that of the court's refusal to allow the question as to prejudice to be answered, and the other, that of the denial of the challenge. The bill of exceptions recites (record, p. 18) that, "among other questions," the juror was asked the particular one under consideration,

and it is entirely silent as to all the remainder of the examination.

We will take up the challenge first. The ground of this challenge is altogether too vague to be considered. The statement is that the defendant submitted a challenge "for cause." For what cause? For implied or actual bias? If either, upon what ground? A challenge "for cause" will lie under these statutes for a great many things, and the party interposing an objection must point out its specific ground. His duty to the court and the rights of the other side alike demand it. Besides it is imperatively required by section 231 of the Oregon statutes above cited. This point is well settled by the authorities.

Bonney vs. *Cocke*, 61 Iowa, 303.
State vs. *Munchrath*, 78 Id., 268.
Paige vs. *O'Neal*, 12 Cal., 483.
People vs. *McGungill*, 41 Id., 429.
People vs. *Cochran*, 61 Id., 548.
State vs *Knight*, 43 Me., 11.
State vs *Spencer*, 21 N. J. L., 196.
Drake vs. *State*,(N. J.), 20 Atl. Rep ,747.

For the reason given, this assignment of error must be denied, but there is an equally conclusive objection under the Oregon decisions, construing the statutes above set forth.

The utmost that can be claimed from the record is that the challenger sought to urge the claim that the juror was affected by actual bias, and in such cases it was said by the supreme court of Oregon: "As to whether the juror was impartial or not, was a question to be tried by the court from the evidence before him. Before we can judge whether the discretion exercised by him in overruling the challenge was a sound discretion and properly exercised in this case, we must have all the evidence before us in this court that was adduced on the trial of the challenge in the circuit court."

State vs. *Tom*, 8 Or., 177.

Hayden vs. *Long*, Ib., 244.

State vs. *Brown*, 7 Id., 186.

State vs. *Saunders*, 14 Id., 300.

Of course by virtue of section 800 of the Revised Statutes the laws of Oregon as construed by these decisions of its highest court are of binding force here.

United States vs. *Reed*, 2 Blatch., 435

United States vs. *Douglass*, Ib., 207.

United States vs. *Wilson*, 6 McLean, 604.

United States vs. *Benson*, 31 Fed. Rep., 896.

Morever, all presumptions are in favor of the regularity of the court's proceedings, and the decision of the trial court upon a challenge for actual bias is final and will not be reviewed except for a gross abuse of discretion, which must be affirmatively shown by the party urging the objection.

Hopt vs. *Utah*, 120 U. S., 430.

Spies vs. *Illinois*, 123 Id , 131.

State vs. *Munchrath*, 78 Iowa, 268.

State vs. *Potts*, 100 N. C., 457.

Morrison vs. *Lovejoy*, 6 Minn., 319.

People vs. *Goldenson*, 76 Cal., 328.

White vs. *Territory*, 3 Wash. T., 397.

Babcock vs. *People*, 13 Colo., 515.

In regard to the question propounded to this juror, there is not enough stated in the record to enable this court to reach any intelligent conclusion as to the propriety of the action of the trial court. Counsel for the plaintiff in the case made no objection to the question, and there is nothing going to show the object had in view in offering it, or the reason of its exclusion. The proper course in such cases undoubtedly is to call upon the court for a statement of the ground of its ruling, and then if there is a misapprehension

between the court and counsel, the latter should indicate the object had in view in putting the question, and all this should be certified up in the record. (*Estate of Page*, 57 Cal., 238.) Else how can the appellate court tell anything about the situation? The ruling of the trial court may or may not have been correct, and unless error is affirmatively shown it will be upheld. If this court is to announce a general rule to govern such cases, it cannot be other than that the whole examination must be certified up before the ruling of the lower court will be reviewed at all. The trial court may have considered the question as immaterial, or inopportune, or redundant, or a further examination may have cured the defect. We cannot say what the view of the court was here, but this tribunal must establish a general principle.

We can only conjecture the argument which will be made upon this point. The primary and most natural design in asking such a question would appear to be the laying of a foundation for a challenge for actual bias. In this view of the case the better opinion seems to be that the proper manner of considering the question is to concede that the answer would have been favorable to the questioner, and then to consider that such answer had taken its stand with the rest of the evidence, in which case

the decision of the court would be reviewable only as above indicated.

It has also been held that such questions are improper and too remote to be entitled to consideration in this connection.

For a general discussion of the views entertained on the result of a refusal to allow such questions to be answered by jurors, see

State vs. *Wilson*, 8 Iowa, 407.

Costigan vs. *Cuyler*, 21 N. Y., 134.

Balbo vs. *People*, 80 Id., 484.

United States vs. *Noelke*, 17 Blatch., 554.

We apprehend, however, that it will be urged that the question should have been allowed in order that the party might have been enlightened as to his right of peremptory challenge. This cannot change the force of our argument above set forth, and there is all the more reason for a full statement of the purpose of the questioner. If counsel put a question which in its apparent reach is obviously objectionable, but there is some ulterior end in view, that should be stated at the time. It will not do to entrap the court in this way. And if it be claimed that the question was proper in order to develop the juror's attitude that a peremptory challenge might be interposed, it has been held that "general explorations" for this purpose are inadmissible.

People vs. *Hamilton*, 62 Cal., 377.

The earlier cases are overruled by this decision.

But after all this discussion, this exact point has been settled by the supreme court of Oregon, and the remedy of a party claiming to be aggrieved under such circumstances has been pointed out. They say:

"The questions put by the appellant's counsel to the juror R. Sargeant, as to whether there was any prejudice existing in his mind against the County Court of Umatilla County, and whether there was any such prejudice or ill-feeling growing out of the transaction then before the court, were proper questions under a practice that has been permitted in trial courts in the State, though we are not aware of its being authorized by statute. Questions of that character are asked in order to ascertain whether or not any grounds of challenge exist. But being a mere question of practice that has been permitted by sufferance of the trial courts, this court will not undertake to enforce it. The appellant's remedy, where the court refused to allow the said questions to be asked the juror, was to have submitted a challenge to the juror for actual bias, *and specified the grounds upon which it was taken.* Then, if the respondent's counsel had excepted to the challenge, and the Circuit Court determined that it was insufficient, the decision thereon could have been reviewed by this court. Title

2 of chapter 2 of the Civil Code prescribes the mode of procedure in such cases, but as the matter now stands, this court cannot consider it." *Ford* vs. *Umatilla County*, 15 Or., 313, 322. The foregoing italics are ours.

II.

The second assignment of error likewise sets forth two exceptions. It is as follows;—

"The court erred in refusing to allow Mr. Craybill, who was being examined on *voir dire* as to his competency to sit as a juror upon the trial of this cause, to answer the following question, propounded to him by defendant's counsel, after he, Craybill, had stated that he had to a certain extent, an opinion formed as to the cause of the wreck, and the liability of the company for it:

"Question. Is that such an opinion as would require evidence to remove it?

"And the court further erred in overruling defendant's challenge of said Craybill for cause, after he had further testified on his *voir dire* as follows:

"Question. Is that a fixed opinion?

"Answer. Well, it is an opinion that would certainly take evidence to remove it.

"Question. Then you think it is a fixed opinion at the present?

"Answer. Yes, I think so.

"Whereby defendant was forced either to accept of said Craybill as a juror or to challenge him peremptorily, which latter defendant did, and was thereby forced to exhaust one of the three peremptory challenges allowed it by law." (Record, p. 167.)

The first of these exceptions is obviously avoided by the subsequent examination, as above set forth.

As to the second point, it is fully covered by section 187 of the Oregon laws, and the authorities above cited go to show that this court will not review the decision of the trial court. Says Jones, C. J., in *White* vs. *Territory*, 3 Wash. T., 397: "The evidence is heard by the court, and a question of fact is decided by the court. It is largely a discretionary finding. Two persons may give exactly the same answers to the same questions, and one of them be found competent and the other incompetent. The court sees the persons, observes their manner, their apparent intelligence or want of it, and is justified in weighing their answers, and these circumstances, in passing upon the evidence and finding the fact; and unless the record discloses a fault or an abuse in such finding, this court ought not to reverse it." See also

Reynolds vs. *United States*, 98 U. S., 145.

But there is a further conclusive answer to the second objection. It is held by the Oregon court that although a party be wrongfully put to a peremptory challenge he is not injured thereby unless he exhausts all his challenges, *and then has an objectionable juror forced upon him.*

Ford vs. *Umatilla County*, 15 Or., 312.

This view is held elsewhere, and the injury must be affirmatively shown.

Heucke vs. *M. C. R. Co.*, 69 Wis., 401.

Carthaus vs. *State*, 78 Id., 560.

State vs. *Raymond*, 11 Nev., 98.

Fleeson vs. *Savage S. M. Co.*, 3 Id., 157.

Cotton vs. *State*, 32 Tex., 614.

Now it is true that the record shows a use of all the defendant's peremptory challenges before the jury was completed, but it does not show that any objectionable person was thereafter seated. In fact it shows (record, p. 25) that after all the peremptory challenges had been exhausted the only persons to whom objection was made were excluded, and that all other persons were "examined and taken as jurors" until the panel was filled.

III.

The third assignment is as follows:—

"The court erred in overruling defendant's challenge for cause of C. P. Bacon as a competent juror to sit upon the jury in the trial of this cause, he, the said Bacon, having testified as follows, upon examination on his *voir dire* as to his qualifications to sit as a juror, namely:—

"Question: Have you heard or read anything in regard to the supposed cause of the wreck, or anything in regard to whether the railroad company, in your judgment, should be held liable or not for the wreck?

"Answer: I have.

"Question: Where did you obtain the information?

"Answer: From reading the newspapers.

"Question: From what you read, did you form or express any opinion as to the liability of the company, or otherwise?

"Answer: I have, both.

"Question: Is that a fixed opinion?

"Answer: It is.

"Wherefore defendant's counsel challenged said juror for cause, which challenge was overruled by the court." (Record, p. 167.)

This point is exactly covered by the Oregon statute, and by *State* vs *Saunders*, 14 Or., 300,

and as the bill of exceptions (record, p. 20) does not purport to set forth all of the examination, the case is within the other decisions of the Oregon supreme court above cited.

IV.

The fourth assignment of error is as follows:

"The court erred in refusing to allow V. Cimino to answer the following question propounded to him by defendant's counsel in his examination on *voir dire*, as to his qualifications to sit as a juror on the trial of this cause, namely:

"Question: Do you think that you would be governed by the evidence that would be given in this case, and the law as given you by the court, without regard to anything you may have read or heard about it?" (Record, p. 167; see bill of exceptions, p. 21.)

What has been said above in regard to the case of Griffin fully covers the point involved here, and there is the additional consideration that under the Oregon practice this question was not a proper one. Such questions are allowed by statute in some States, but their effect is in large measure to make the juror, and not the trier, the judge of his qualifications. In Oregon the juror testifies to facts and the court draws the conclusions. More-

over, if this question were at all allowable, it is not shown that any foundation existed for asking it.

V.

The fifth assignment is as follows:

"The court erred in refusing to allow H. B. Foster, when examined on his *voir dire* as to his competency to sit as a juror on the trial of this cause, (after he had stated that he had formed an opinion which he still entertained as to the cause of the wreck and the liability of defendant therefor), to answer the following question propounded to him by defendant's counsel, namely:

"Question: I will ask you to state whether it would take evidence to remove the opinion which you have formed?

"Whereby defendant was forced either to challenge said Foster peremptorily, or to accept him as a juror in the cause, which latter the defendant did." (Record, p. 168.)

The same considerations apply here as in Griffin's case, and we may add that so far as anything is shown by the record as to the views of the court, the objection was as to the form of the question. The same question had been previously asked Craybill, and when it was excluded counsel were allowed to ask one similar in effect, (record, pp. 19, 20), and this ought to have been a guide in the examination of this juror.

VI.

The sixth assignment is as follows:

"The court erred in refusing to allow D. C. Richardson to answer the following qnestion propounded to him by defendant's counsel on examination on *voir dire*, as to his qualifications to sit as a juror on the trial of this cause, after he had testified that he had formed and still entertained, to some extent, an opinion as to the cause of the wreck, and the liability of the defendant therefor, namely:

"Question: Do you think, notwithstanding the opinion you have formed, that you could try this case according to the evidence as it shall be given you here, and the charge of the court, without regard to anything else?" (Record, p. 168.)

The question excepted to could only have had the effect of substituting the juror for the court, and the argument and authorities submitted above in regard to other jurors are applicable here.

VII.

The seventh assignment is as follows:

"The court erred in overruling the challenge of defendant's counsel for cause of Thomas O'Connor as a person qualified to sit as a juror on the trial of said cause, after he had testified as follows on his *voir dire:*

"Question: Is your name on the tax roll of Multnomah County?

"Answer: It has been; I could not say that it is at present. I have been a tax payer; I have no taxable property now, exactly; it is in my mother's name. I had a lot in East Portland, but that just now is in my mother's name. I guess it is about two years or a year and a half, something like that, since I have had any taxable property in my own name.

"Counsel for defendant, having previously, by peremptorily challenging Mr. Barr, exhausted the three peremptory challenges allowed it by law."

This statement is totally at variance with the facts and cannot be considered. O'Connor was challenged by the plaintiff in the action, the challenge was sustained, and he did not sit as a juror. (Record, p. 23.)

VIII.

The eighth assignment of error raises the converse of the propositions discussed above. It is as follows:

"The court erred in sustaining the challenge for cause interposed by plaintiff's counsel to Herbert Holman as a competent and qualified juror to sit on the trial of this cause after he had been accepted by defendant, but

had answered on further examination on his *voir dire* as follows, questions propounded to him by plaintiff's counsel:—

"Question: What interest have you in the boat on which you run?

"Answer: I am a stockholder in the company.

"Question: Has your company any business conection with the Southern Pacific Company?

"Answer: We have.

"Question: Is it extensive?

"Answer: I do not know what you call extensive. It amounts to considerable to us; it is quite an accommodation.

"Question: Is it a general traffic arrangement?

"Answer: It is in this season." (Record, pp. 168–9)

In no case is a trial court given more discretion in the matter of allowing or disallowing a challenge than in such instances as the one here presented. It is perfectly manifest from this juror's answers (record, pp. 23, 24), that he did not occupy the position of a disinterested party and his exclusion was eminently proper. Moreover, the defendant below took no exception to any one of the jurors who were afterwards empanelled and sustained no injury by this ruling, conceding it to have

been erroneous. The defendant is here claiming the right of "selection," and not of "rejection," which is not open to him.

N. P. R. R. Co. vs. *Herbert*, 116 U. S., 642.

Hayes vs. *Missouri*, 120 Id., 68.

Sutton vs. *Fox*, 55 Wis., 531.

Territory vs. *Roberts*, 9 Mont., 12.

IX.

The ninth assignment of error is as follows:

"Error of the court in permitting plaintiff, against the objection of the defendant's counsel, to answer the following question propounded to him by his own counsel:

"Question: You may state what family you have.

"Which was objected to by defendant's counsel as being immaterial.

"Whereupon the court ruled as follows: I think this may be admitted for this reason; of course it cannot be admitted to affect the question of damages sought to be recovered. But we will take some notice of human nature and its tendencies, the affections of men and women; and I think it may be assumed that a father and husband ordinarily, if his family

needs his services to support their lives, would naturally give it to them, if he could. It does not always follow that he will, because we know there are a great many men who do not; but we may assume that to be the rule. If this man remained in bed a certain length of time, or all the time, since this accident occurred, I think the fact that he has a family dependent upon him, and no resources, might go the jury for what it is worth, to say whether he is shamming or not.

"Whereupon plaintiff answered as follows:

"Answer: I have a wife and two children.

"Question: How old is the oldest?

"Answer: Seven years the one and five years the other." (Record, p. 189.)

These questions were allowed to be answered on the strength of *Caldwell* vs. *Murphy*, 11 N. Y. 416. The jury certainly undertood the use they were allowed to make of the testimony, and its qualified admission was unquestionably sound. Here was a man confessedly prostrated, but with no obvious signs of injury. He had been a robust, athletic, energetic person, and his individual exertions had been the means of his support. He maintained that his back had sustained an injury which incapacitated him from leaving his bed, while the defendant below contended that his condition was the result of his indisposition to make an effort to aid himself. The point had

to be proved and disproved largely by expert and circumstantial evidence, and the questions propounded to the witness were clearly legitimate.

X.

The tenth assignment of error is as follows:

"The jury in finding their verdict against defendant in favor of plaintiff for ten thousand dollars damages, disregarded the following portion of the charge given to them by the court:

"The medical witnesses who have testified on behalf of the plaintiff, while expressing the opinion that he is a very sick man, all admit that they are unable to discover any positive present sign of injury to his person, or any symptom in his case other than frequently attends hysteria, and say that they are unable to determine what is the matter with him; while the medical witnesses on the part of the company all say that the plaintiff's case is one of clearly defined traumatic hysteria, or a hysterical condition following an injury, which condition, under proper advice and treatment, should not have existed; that his real injury at the time of the wreck was only slight; and that his present apparent condition is unnecessary and unreal. No medical witness on the part of the plaintiff claims to have had

any previous experience in treating any apparently similar injury from a railroad accident, while two of defendant's medical witnesses testify to having had very considerable experience in such cases. If, therefore, you believe that these medical witnesses are all equally honest and equally capable in their professional qualifications, the testimony of those of them who have had experience in such cases is entitled to greater weight than is the testimony of those who have not had any such experience, and in arriving at your verdict, you should be governed always by the better evidence." (Record, pp. 169, 170.)

It is difficult to see how anything can be hoped to be accomplished by an exception of this character. The charge itself is obnoxious for practically directing the jury to return a verdict upon the expert evidence, but it is not excepted to, and it leaves the jury to elect as to which class of medical experts it deemed most credible; it amounts to nothing more than telling them that they must find by a preponderance of the evidence, and the exception calls upon this court to determine that the verdict was against the weight of evidence. This will not be done except in a very clear case. The authorities upon the proposition are almost innumerable, and we will only call the attention of the court to the following:

2 Gra. & Wat. on New Trials, 49.

Fearing vs. *DeWolfe*, 3 W. & M., 185.

Davey vs. *Insurance Co.*, 20 Fed. Rep., 494.

Gwynn vs. *Schwartz*, 32 W. Va., 487.

Nor do the federal courts have such latitude in disturbing the findings of juries as is possessed by the State courts under the modern practice.

Cons. U. S., Amend. 7.

Rev. Stats. U. S., Sec. 649.

Hepburn vs. *Dubois*, 12 Pet., 345.

Stewart vs. *Sixth Ave. Co.*, 45 Fed. Rep., 21.

But to look at the question on its merits, here the plaintiff below had his medical attendant who had been with him from the commencement of his trouble, and three disinterested physicians and surgeons in his support. The defendant had its retained physician and surgeon and two others in support. Their testimony was all to the effect that the plaintiff s condition in point of fact was seriously bad at the time of the trial, and they differed only in their theories as to its cause. How can it be said the evidence so preponderated for the defendant that the ver-

dict could only be in its favor? Moreover, there is a volume of evidence running all through the record, and too lengthy to be reproduced, from witnesses other than these medical experts, going to establish the extent of the plaintiff's injury, and the jury would have been fully warranted in returning a verdict upon it against the whole force of the defendant's expert evidence. And, as a matter of law, expert evidence is not held in such high esteem as the plaintiff in error would have us believe.

Gay vs. *Insurance Co.*, 9 Blatch., 142.
Copp vs. *Insurance Co.*, 51 Wis., 637.
Spensley vs. *Insurance Co* , 54 Id., 433.
James vs. *Herring*, 12 S. & M., 336.

It is also proper that the court should consider the other charges which were given to the jury in this connection, and which will be found on pages 152–3 of the record.

XI.

The eleventh assignment is as follows:

"The damages allowed by the jury are excessive, and so contrary to the testimony of the medical witnesses, as to show that the jury were governed by passion or prejudice in fixing said damages." (Record, p. 170.)

This exception is made to depend upon the testimony of the medical witnesses, but the verdict does not. The authorities cited upon the question last involved are to a great extent applicable here, and as to the immediate point of the court interfering with the verdict of the jury on the ground that the damages thereby allowed are excessive, it is well settled that the trial court will not interpose unless the damages are flagrantly exorbitant.

Thurston vs. *Martin*, 5 Mason, 497.

Wightman vs. *Providence*, 1 Cliff., 524.

Boyce vs. *Staye Co.*, 25 Cal., 460.

McConnell vs. *Hampton*, 12 Johns., 233.

Railroad Co., vs. *Thompson*, 64 Miss., 584.

Railroad Co., vs. *Roddy*, 85 Tenn., 400.

Railroad Co., vs. *Fox*, 11 Bush, 495.

Belair vs *Railroad Co.*, 43 Iowa, 662.

Railroad Co., vs. *Acres*, 108 Ind., 548.

In *Brown* vs. *Evans*, 8 Saw., 488, Sabin, J., after a review of the authorities on this subject, says, "And so, however it may be expressed by a court, the idea and principle always is, that a court will not set aside a verdict in an action of this character, except

in extreme and exceptional cases." And an appellate court will be far more cautious than a trial court.

We respectfully submit that the record discloses no error, and that the judgment of the lower court should be affirmed.

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